

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

JUDGE ABRAMS

ADAM CONTI,

Plaintiff,

v.

UNITED STATES DEPARTMENT OF  
HOMELAND SECURITY,

Defendant.

Civil Action No.

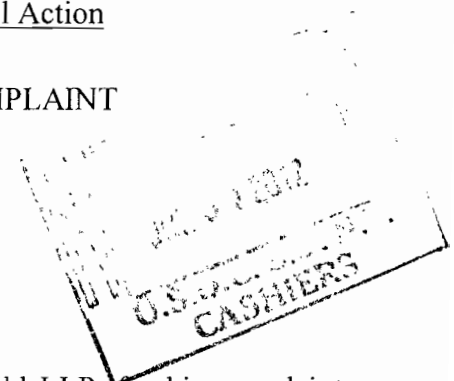
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CV

Civil Action

5827

COMPLAINT



Plaintiff, Adam Conti, by his attorneys, Fox Rothschild LLP, for his complaint against the Defendant, alleges as follows:

**JURISDICTION**

1. Plaintiff's action is brought pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C.A. § 552, and under the Administrative Procedure Act ("APA"), 5 U.S.C.A. §§ 701 et seq., for declaratory and injunctive relief for violations of the above-mentioned Acts and the release of records requested by Plaintiff from Defendant.

**VENUE**

2. Venue is properly laid in this District under 5 U.S.C.A. § 552(a)(4)(B), as this District is the locale in which Plaintiff resides and in which Defendant has a place of business, and under 5 U.S.C.A. § 703.

**PARTIES**

3. Plaintiff is and was at all times material to this action an individual residing at 100 Ridge Road, Ardsley, New York.

4. Plaintiff submitted the FOIA request that is the subject of this action.

5. Defendant United States Department of Homeland Security / Immigration and Customs Enforcement (“ICE”) is and was at all times material to this action an agency of the United States, with offices located at 601 W. 26<sup>th</sup> Street, New York NY 10001; 26 Federal Plaza, New York NY 10278; and JFK International Airport, Building 75, Jamaica NY 11430, among other locations.

6. Plaintiff, through his counsel, submitted a FOIA request in April 2011.

7. Plaintiff’s counsel corresponded with Defendant on numerous occasions seeking to obtain responsive documents.

8. Despite numerous promises to produce the full scope of documents in a timely fashion, Defendant failed to timely produce documents and failed to produce the full scope of documents.

9. Those documents which Defendant did produce included a number of inappropriate redactions, for example, the author and recipient of e-mails.

10. Defendant also failed to produce any documents whatsoever in response to specific categories of documents, believed to exist, and failed to account for that non-production.

11. Defendant has possession of the records which Plaintiff seeks and has failed to produce those records despite Plaintiff’s repeated reasonable efforts to gain access to public information.

12. Plaintiff has exhausted his efforts and now appears before this Court to force Defendant to produce those records it is obligated to produce.

**BACKGROUND**  
**AND**  
**FACTUAL ALLEGATIONS COMMON TO ALL CLAIMS FOR RELIEF**

13. Plaintiff was a former Technical Enforcement Officer and highly decorated 16-year veteran Law Enforcement Officer within what is now the Defendant.

14. Plaintiff has pending two actions before the Merit Systems Protection Board, both relating to wrongful employment action taken against him when various members of Defendant began a campaign to injure Plaintiff's reputation and employment. Each of these wrongful employment actions were taken in retaliation after Plaintiff made numerous whistle-blowing disclosures regarding inadequacies that put Defendant's staff and the general public at risk of personal harm.

15. The retaliation occurred after a series of events commencing in 2007 and continuing well into 2008. The retaliation specifically resulted in a number of "personnel actions" already recognized by the Merit Systems Protection Board as having occurred.

16. Among the whistle-blowing disclosures made by Plaintiff, many stemmed from two events.

17. The first event concerned his surveillance efforts relating to a theft ring operating out of New York in which members of the Defendant's investigatory "team" and the general public were placed at harm because of the way the investigation was handled. For example, the theft ring would target the homes of elderly people for home invasions and burglaries, and those included occasions when the thieves would forcibly enter homes and prey on their elderly occupants. Defendant was aware of the situation but was not taking all action necessary to protect the public. Additionally, Defendant's personnel were being placed into sensitive investigatory situations without adequate back-up to ensure that the investigatory targets would

not happen upon those personnel in circumstances where the personnel would be unable to defend themselves.

18. Plaintiff's critical internal disclosures about the situation described in the preceding paragraph resulted in Defendant's personnel seeking to harm his professional reputation and ultimately his employment.

19. The second event concerned the Port Authority of New York/New Jersey ("Port Authority"). Plaintiff made disclosures involving extreme port vulnerability from domestic and foreign terrorist threats in Port Newark that concerned (a) lack of checkpoints and police presence, (b) access to restricted areas, (c) people accessing Port buildings and secure areas, (d) thieves targeting businesses within the Port and getting access to secure areas to, *e.g.*, steal goods from businesses located in the Port, (e) those thieves using stolen vehicles as battering rams to gain egress from the secure areas with additional stolen goods, (f) failure to integrate Port security with the security systems in place at Port businesses, and (g) the Port Authority storing hazardous materials in a haphazard manner. In short, Plaintiff questioned the Port Authority's ability to ensure the Port's security from terrorist vulnerability.

20. Plaintiff's raising these issues triggered a series of internal investigations within Defendant. One such investigation – against Plaintiff – was triggered by a Port Authority Police Department Captain's retaliation for disclosures that directly reflected weakness in the ability of that Captain's department to secure Port Newark (see preceding paragraph). Other disclosures made by Officer Conti reflected Defendant's unwillingness to investigate its own personnel's improper arrangements with the Port Authority, such as the use of Port Authority placards for special parking privileges and the system of Defendant's retirees securing jobs within the Port

Authority and using that role to try and wrongfully investigate Plaintiff and wrongfully make statements about him to Defendant.

21. Hearing of these matters, Plaintiff's supervisor, Supervisory Special Agent Steven Kucan ("Agent Kucan"), began leaking the existence of investigations. Agent Kucan also attempted to have the criminal case referred to in Paragraph 17 above closed and blame its closure on Plaintiff – *i.e.*, to "frame" Plaintiff and derail an ongoing federal investigation.

22. Also, Agent Kucan was engaged in a criminal conspiracy where he and others were taking Defendant's property and selling it on eBay for their own personal profit. Plaintiff was involved in securing Defendant's facilities – he was, for example, custodian of Defendant's building keys – and Agent Kucan undertook efforts to remove Plaintiff from that security role in order to gain control over security himself.

23. Agent Kucan was subsequently the subject of a criminal complaint, and plead guilty to criminal charges relating to his theft.

24. Ultimately, Plaintiff's duties were revoked and he was forced into moving boxes of paper from one office to another, and provided no information on why this employment action was taken and when it would end. More importantly, Agent Kucan's malfeasance – as Plaintiff's supervisor, as an "operative" of Defendant's Office of Professional Responsibility, in attempting to frame Plaintiff and manipulate others to do the same, and as a criminal actor – led to Plaintiff's resignation in October 2008 in order to end the unlawful punishment. Plaintiff is now litigating this "constructive discharge."

25. Plaintiff's litigation before the Merit Systems Protection Board is pending, and Plaintiff has spent almost four (4) years of litigation against Defendant – much of which has been spent trying to get Defendant to produce documents.



26. Plaintiff also filed the Freedom of Information Act (“FOIA”) requests that are the subject of this complaint, as a member of the public seeking documents relating to what he believes is the gross mismanagement of certain divisions within Defendant’s organization, including the Defendant’s Office of Professional Responsibility.

27. For example, the Office of Professional Responsibility (“OPR”) received disclosures from Plaintiff about certain persons within OPR – but then notified the subject of the disclosures about them, left the subject of the disclosures in charge of an investigation of Plaintiff, and ultimately never even investigated Plaintiff’s disclosures at all. OPR is tasked with investigating employee malfeasance and criminal activity within Defendant.

28. Plaintiff also made disclosures to OPR about Agent Kucan’s conduct, yet Agent Kucan was made an OPR-operative and was allowed to continue as Plaintiff’s supervisor – and continued to punish Plaintiff.

29. On April 12, 2011, Plaintiff through his counsel submitted a FOIA request. See Exhibit A. The Defendant subsequently assigned case number 2011FOIA7411 to this request.

30. On April 13, 2011, Defendant e-mailed Plaintiff’s counsel and acknowledged receipt of the FOIA request. That e-mail also requested that Plaintiff limit Request Nos. 9 and 10 of the April 12<sup>th</sup> request. See Exhibit B.

31. The April 13<sup>th</sup> e-mail from Defendant also included a third-party authorization form for return to Defendant.

32. On April 14, 2011, Plaintiff’s counsel returned the authorization form to Defendant. See Exhibit C.

33. On April 18, 2011, Plaintiff’s counsel e-mailed Defendant and limited Request Nos. 9 and 10 to specified individuals. See Exhibit D.

34. On May 19, 2011, Defendant provided its “final response” to FOIA number 2011FOIA7411. See Exhibit E. The May 19<sup>th</sup> final response summarized the 12 categories of records requested and produced approximately 130 pages of documents.

35. With respect to two categories, Defendant withheld 101 pages of 115 total pages because policy allegedly protects the disclosure of government employees from FOIA or third parties with a privacy interest protecting any of the information contained on the documents from any disclosure whatsoever.

36. Were this to be FOIA law, no public records would ever be subject to production to the public. The May 19<sup>th</sup> response was erroneous in its summary of FOIA and wrongfully withheld documents.

37. With respect to 9 of the 12 categories of the FOIA request, the May 19<sup>th</sup> response refused to acknowledge the existence of records or produce any, lacking consent from the individuals. One of the individuals about which this claim was made is Plaintiff, meaning that Defendant refused to produce to Plaintiff records concerning him because Plaintiff had not consented to release of the records. This is nonsense.

38. The May 19<sup>th</sup> response only produced documents relating to two of the many categories of requested documents.

39. The May 19<sup>th</sup> final response requested payment of \$471.50 to process the request for copies of those documents that Defendant would produce.

40. Plaintiff’s counsel submitted a check for this amount on or about May 24, 2011. No response was received in May or June 2011.

41. On July 18, 2011, Plaintiff’s counsel e-mailed Defendant again. See Exhibit F.

42. On July 18, 2011, Defendant responded and apologized for the delay, indicating that confirmation of the payment was not received until the week of July 11, 2011. See Exhibit G. Defendant indicated that it was conducting searches for records. Defendant also stated that the request was now being processed under FOIA number 2011FOIA10480.

43. On August 8, 2011, Plaintiff's counsel spoke to Defendant and then sent an e-mail confirming that (a) the documents had not been produced, (b) the "program" had still not forwarded documents to the FOIA office, and (c) Defendant recognized the response was taking too long. See Exhibit H.

44. On August 15, 2011, Plaintiff's counsel again e-mailed Defendant seeking a status update. See Exhibit I.

45. On August 15, 2011, Defendant responded and apologized for the delay, indicating that the Office of Homeland Security was conducting the search and stated the search was "underway" but that a completion date could not be given. Defendant also indicated that it was trying to determine whether e-mail records of since-departed employees were still accessible. See Exhibit J.

46. Defendant did not explain why, as a law enforcement agency also charged with maintaining public records, e-mail records from departed employees would no longer be available. This explanation makes no sense.

47. On September 14, 2011, Plaintiff's counsel again e-mailed Defendant seeking a status update. See Exhibit K. That e-mail referenced the 155 days which had passed since the original FOIA request.

48. On October 12, 2011, Plaintiff's counsel called Defendant and was placed on hold, only to be told that the individual with whom counsel had been corresponding (Ryan Law)



had requested that a supervisor return the call from Plaintiff's counsel. That supervisor's name is L. Todd Fuss. As of that date, the FOIA response was 183 days overdue.

49. On October 12, 2011, Plaintiff's counsel finally spoke to Defendant's "supervisor," Todd Fuss. Plaintiff's counsel was advised that Defendant's FOIA unit had received some documents, needed to review them during the week of October 17, 2011, and would begin releasing some records thereafter. Plaintiff's counsel was told that the Defendant's FOIA unit was still waiting on the release of additional documents to it.

50. On October 29, 2011, Defendant wrote to Plaintiff's counsel and provided an "interim response" to the April 13, 2011 FOIA request, number 2012FOIA10480 (presumably meaning 2011FOIA10480). See Exhibit L.

51. The October 29<sup>th</sup> interim response claimed a number of FOIA exemptions for documents responsive to the FOIA request, including e-mails exchanged between ICE personnel and personnel in the Office of Homeland Security Investigations, the names of Defendant's employees, the identity of any and all third parties mentioned in the documents, "attorney-client privileged" documents although no reference to any attorney was noted. The October 29<sup>th</sup> interim response also provided that an appeal could be filed within 60 days of October 29<sup>th</sup>.

52. On October 31, 2011, Defendant e-mailed Plaintiff's counsel and advised that the "first interim response" had been placed in the mail, and that Defendant was still waiting on searches for three of the individuals. See Exhibit M.

53. Between October 31, 2011 and November 9, 2011, Plaintiff's counsel left telephone message for Defendant's FOIA supervisor, Todd Fuss. These calls were not returned.

54. On November 9, 2011, Plaintiff's counsel wrote to Defendant's FOIA Officer, Catrina Pavlik-Keenan, regarding Defendant's woefully deficient FOIA response. See Exhibit N.

55. The November 9<sup>th</sup> letter highlighted the 211 days which had passed since the FOIA request was filed, the improper redaction of information from the documents produced, the fact that the response was limited to only certain categories of documents sought, the continuing failure to complete the FOIA search, and the non-comprehensive nature of the search that was conducted. The redactions included the names of parties mentioned in e-mails, and sending and receiving e-mails. These redactions included any mention of Plaintiff's name.

56. By way of example, Plaintiff's November 9<sup>th</sup> letter attached e-mails that Plaintiff had obtained elsewhere – in discovery in his contested matters with Defendant now pending before the Merit Systems Protection Board – but which had not been produced or even acknowledged to exist in the FOIA response. This led Plaintiff to conclude that Defendant had not conducted the search required by law.

57. On November 18, 2011, Plaintiff's counsel spoke with Defendant's FOIA supervisor, L. Todd Fuss. Mr. Fuss indicated that the November 9, 2011 letter was “sent up the chain” and that Defendant would need to respond to the letter. As for the balance of the FOIA request, Mr. Fuss stated that he expected to be sending additional documents during the week of November 21, 2011.

58. On November 25, 2011, Defendant sent a letter to Plaintiff's counsel, stating that it was the “final response” to the April 13, 2011 FOIA request (case number 2011FOIA10480). See Exhibit O. In particular, it stated that the October 29, 2011 FOIA response represented Defendant's complete response to the FOIA request.

59. On November 28, 2011, Defendant acknowledged receipt of the November 9, 2011 letter sent by Plaintiff's counsel and assigned it number OPLA12-329 for tracking purposes. See Exhibit P.

60. On December 1, 2011, Plaintiff's counsel spoke with Mark Graf of Defendant regarding the FOIA request and the November 28, 2011 letter. Mr. Graf confirmed that the November 25<sup>th</sup> letter represented Defendant's final response. Mr. Graf also stated that the November 9, 2011 letter sent by Plaintiff's counsel was being considered an appeal of the FOIA determination. Mr. Graf also stated that Defendant had provided documents in response to the FOIA request to the extent such documents existed. However, the FOIA response itself admitted that Defendant had not searched all categories listed in the FOIA request. Defendant also made no mention of the additional documents referred to in the November 18<sup>th</sup> telephone call (see paragraph 57).

61. On December 2, 2011, Plaintiff's counsel sent a letter to Defendant's Associate General Counsel formally appealing the October 29, 2011 interim response and the November 25, 2011 final response. See Exhibit Q (with attachments). The appeal highlighted Defendant's (a) improper redactions, (b) limited response to the categories listed in the FOIA request – only two of the 13 categories listed, (c) untimeliness of the response (233 days had passed since the request was made) and continuing failure to respond to the entire FOIA request, and (d) the non-comprehensive search conducted by Defendant.

62. Among other things, the December 2<sup>nd</sup> letter also highlighted FOIA request category number 3, which sought "Exact copies of, and any and all documents and recordings that refer or relate to the investigatory case file and/or records of investigation of Steven Kucan, SAIC NY-Supervisory Special Agent, from 2006 through the present." During the time in which

Defendant allegedly searched its records, it was public information that Mr. Kucan – who was Plaintiff’s supervisor and who took employment action against Plaintiff to further his own criminal conspiracy – was the subject of a criminal complaint and plead guilty to certain criminal acts concerning his employment with Defendant. There could be no dispute that Defendant possessed the documents leading to the conviction, however, not a single document was ever produced to Plaintiff, let alone searched by Defendant in response to the FOIA request.

63. On December 15, 2011, Defendant wrote to acknowledge the appeal and admitted that “it is likely that additional responsive records may be found in locations the agency has not yet searched, including Homeland Security Investigations (HSI).” See Exhibit R. Defendant remanded the appeal for processing and re-tasking. The letter further claimed that FOIA exemptions allowed Defendant to redact all third party names to protect their privacy, including Plaintiff’s own name. Finally, the letter stated that the appeal was being closed.

64. On December 21, 2011, Defendant acknowledged receipt of the remanded request for documents and, invoking a 10-day extension to the 20-day mandatory response period, indicated that every effort would be made to comply within that time. See Exhibit S. Reference number 2012FOIA3641 was now assigned to the FOIA request.

65. On December 22, 2011, Defendant wrote and reiterated the 13 categories of documents sought by the April 13, 2011 FOIA request. See Exhibit T. Defendant again invoked a 10-day extension to the 20-day mandatory response period, and again indicated that every effort would be made to comply within that time.

66. On January 11, 2012, Defendant wrote to acknowledge an appeal regarding the 13 categories of documents under (new) FOIA reference number 2012FOIA3641 and assigned it number OPLA12-367 for tracking purposes. See Exhibit U.

67. On June 22, 2012, Plaintiff's counsel e-mailed Defendant regarding the Defendant's failure to provide responsive documents for nearly two years. See Exhibit V.

68. On June 22, 2012, L. Todd Fuss of Defendant e-mailed Plaintiff's counsel. See Exhibit W. The e-mail confirmed that appeal 2011FOIA10480 was reopened as 2012FOIA3641, that the program office was on December 22, 2011 re-tasked with conducting a search for all items and personnel covered by the request and that the FOIA office had not yet received any responsive documents. Simply put, the FOIA office was "still awaiting the results of the search."

69. On June 22, 2012, Plaintiff's counsel e-mailed Defendant stating that the June 22<sup>nd</sup> e-mail from Mr. Fuss did not answer the question of when the responsive records would be received, and did not even indicate when the search results were expected. See Exhibit X.

70. Well over two years after making the FOIA request and after over twenty-five pieces of correspondence, no response was ever received to the last e-mail from Plaintiff's counsel seeking a status update.

71. Plaintiff still has not received a single document in response to 11 of the 13 categories within his FOIA request.

### **COUNT ONE**

#### **FAILURE TO DISCLOSE RECORDS UNDER THE FREEDOM OF INFORMATION ACT**

72. Plaintiff hereby repeats and realleges each and every allegation contained in paragraphs 1 through 71 of the Complaint as if fully set forth at length herein.

73. Despite Plaintiff's proper FOIA request, made a year and a half ago, and repeated demands for compliance, Defendant has improperly withheld the documents, failing to provide



an adequate response to said request or even providing a date as to when all of the responsive documents can be expected.

74. Records are to be made “promptly available” under FOIA. 5 U.S.C.A. § 552(a)(3)(A).

75. Significantly more than twenty (20) working days have passed since Defendant’s receipt of Plaintiff’s FOIA request, and Defendant has not notified Plaintiff as to whether it will fully comply with said request. Thus, under 5 U.S.C.A. § 552(a)(6)(A) and 5 U.S.C.A. § 552(a)(6)(C), Plaintiff has exhausted his administrative remedies.

76. Plaintiff has a right of prompt access to the requested documents under 5 U.S.C.A. § 552(a)(3), and there is no legal basis for denial of such access by Defendant.

77. Plaintiff has no other adequate remedy at law.

## **COUNT TWO**

### **FAILURE TO COMPLY WITH ADMINISTRATIVE PROCEDURE ACT**

78. Plaintiff hereby repeats and realleges each and every allegation contained in paragraphs 1 through 77 of the Complaint as if fully set forth at length herein.

79. Defendant is required to comply with FOIA and has an obligation to release public records on request under 5 U.S.C.A. § 552.

80. Defendant’s failure to release the requested documents was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law, and the refusal was not supported by sufficient evidence under 5 U.S.C.A. § 706.

81. Plaintiff was harmed as a result of Defendant’s violation of FOIA and the APA because Plaintiff has been denied the benefits and protections provided by compliance with those laws.

82. Plaintiff has no other adequate remedy at law.

**COUNT THREE**

**DECLARATORY JUDGMENT ACT**

83. Plaintiff hereby repeats and realleges each and every allegation contained in paragraphs 1 through 82 of the Complaint as if fully set forth at length herein.

84. As an actual, substantial and justiciable controversy exists between Plaintiff and Defendant regarding their respective obligations, Plaintiff seeks a declaratory judgment under the Federal Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202, declaring Defendant in violation of FOIA and requiring Defendant to immediately produce the responsive documents and a privilege log addressing all documents withheld, that will be binding in any subsequent action.

**REQUEST FOR RELIEF**

WHEREFORE, Plaintiff requests the following relief against Defendant:

1. Expedition of the action as provided in 28 U.S.C.A. § 1657(a);
2. A judgment determining or declaring that Defendant's failure to provide Plaintiff with the requested documents was unlawful under FOIA and under 5 U.S.C.A. § 706;
3. Injunctive relief requiring Defendant to immediately provide Plaintiff with the requested documents;
4. All attorney's fees and litigation costs incurred by Plaintiff in connection with this proceeding as provided by 5 U.S.C.A. § 552(a)(4)(E));
5. Any and all other relief that may be granted pursuant to FOIA or the APA but not explicitly or specifically requested elsewhere in this request for relief;

6. A declaratory judgment under 28 U.S.C. §§ 2201 and 2202, declaring Defendant in violation of FOIA and requiring Defendant to immediately produce the responsive documents and a privilege log addressing all documents withheld; and
7. Any and all other and further relief that this court may deem appropriate.

FOX ROTHSCHILD LLP  
Attorneys for Plaintiff

By:

  
\_\_\_\_\_  
Jeffrey M. Pollock

Dated: July , 2012

**INDEX OF EXHIBITS**

<b>Exhibit</b>	<b>Description</b>
A	April 12, 2011 FOIA request by Plaintiff, through his counsel
B	April 13, 2011 e-mail and letters from Defendant to Plaintiff's counsel
C	April 14, 2011 e-mail from Plaintiff's counsel returning authorization form
D	April 18, 2011 e-mail from Plaintiff's counsel to Defendant
E	May 19, 2011 "final response" from Defendant, with documents
F	July 18, 2011 e-mail from Plaintiff's counsel to Defendant
G	July 18, 2011 e-mail from Defendant
H	August 8, 2011 e-mail from Plaintiff's counsel to Defendant
I	August 15, 2011 e-mail from Plaintiff's counsel to Defendant
J	August 15, 2011 e-mail from Defendant
K	September 14, 2011 e-mail from Plaintiff's counsel to Defendant
L	October 29, 2011 "interim response" from Defendant, with documents
M	October 31, 2011 e-mail from Defendant to Plaintiff's counsel
N	November 9, 2011 letter from Plaintiff's counsel to Defendant's FOIA Officer
O	November 25, 2011 "final response" from Defendant to Plaintiff's counsel
P	November 28, 2011 letter from Defendant acknowledging receipt of the November 9, 2011 letter sent by Plaintiff's counsel
Q	December 2, 2011 letter from Plaintiff's counsel to Defendant's Associate General Counsel formally appealing the October 29, 2011 interim response
R	December 15, 2011 letter from Defendant acknowledging the appeal
S	December 21, 2011 letter from Defendant
T	December 22, 2011 letter from Defendant
U	January 11, 2012 letter from Defendant
V	June 22, 2012 e-mail from Plaintiff's counsel to Defendant
W	June 22, 2012 e-mail from L. Todd Fuss of Defendant to Plaintiff's counsel
X	June 22, 2012 e-mail from Plaintiff's counsel to Defendant